OCBC BANK (MALAYSIA) BHD

v.

ALURAN INTELEK SDN BHD; LAW HOCK HUA & ANOR (INTERVENERS)

HIGH COURT MALAYA, KUALA LUMPUR
RK NATHAN J
[APPLICATION EXECUTION NO: 38-12-2000]
16 FEBRUARY 2001

LAND LAW: *Charge - Order for sale - Application to set aside order for sale - Order for sale by public auction - Whether deputy registrar had the right to vary time of auction - Whether said order was perfected - Whether any variation of the order made without service of required notice to chargor ultra vires - Whether amended conditions of sale must be served afresh on the chargor - National Land Code, s. 258(1)(a)*

This was the defendant's application to set aside an order for sale of the defendant's land by public auction. The defendant had charged a piece of land to the plaintiff in respect of loan facilities granted to the defendant by the plaintiff. Since the defendant had defaulted, the plaintiff obtained an order for sale of the said land by public auction. The proclamation of sale stated that bidders at the auction ought to deposit 10% of the reserve price by way of a bankdraft by 9.15am. The Deputy Registrar (DR) had refused to accept one Thanimalai's deposit as he had failed to make the deposit before the stipulated time. Both the defendant and Thanimalai maintained that the said auction only proceeded at 11.15am and not at 9.30 am as stipulated in the order of the court. The said land was then sold to two other persons for RM352,000. By consent, the parties agreed that the court could only hear the prayer relating to the sale.

Held:

[1] The learned DR was right in rejecting Thanimalai's deposit which was made at 9.20am, but the DR had no power to vary the time of the auction. There was an order already made by the same DR that the said auction would be held at 9.30am and the said order was stipulated. The said order was perfected. It did not contain any order enabling her to vary her own order, and thus was bound by her own order.

[1a] Since Thanimalai's deposit had been rejected, the two successful bidders must have paid their deposit well before 9.15am. No reasons were given

as to why the DR did not proceed to call for the auction to commence at 9.30am. The plaintiff and the two successful bidders have failed to address the court on this issue.

[2] Following the case of *M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor*, any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor was *ultra vires* the authority to sell under the National Land Code (NLC).

[3] It was held in *M&J Frozen Food Sdn Bhd & Anor* that the effect of extending the time of payment of the balance purchase price 'is to cause a material change in the conditions of sale and thus render it no longer in accordance with or within the terms of the original order and determination made by the senior assistant registrar.' The amended conditions of sale bearing some different terms or directions from the original conditions must be served again in accordance with s. 258(1)(a) of the NLC on the chargor. Similarly in this case if the auction was to be held at 11.15am, this fresh condition ought to have been served afresh on the defendant/chargor.

[Defendant granted an order in terms; defendant's costs of this application be paid by the plaintiff.]

Case(s) referred to:
Bank Bumiputra Malaysia Bhd v. Pentadbir Tanah Daerah Gombak [1992] 1 MLJ 78 ***(refd)***
M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor [1994] 2 CLJ 15 ***(foll)***

Legislation referred to:
National Land Code 1965, s. 258(1)(a)

For the plaintiff - S Susheila; M/s Shook Lin & Bok
For the defendant - Francis Pereira; M/s Francis Pereira & Shan
For the interveners - K Thilaga; M/s Soo Thien Ming & Nashrah

Reported by Suhainah Wahiduddin

JUDGMENT

The Application

This is the defendant's application to set aside an order for sale of the defendant's land held under H.S.(D) 86672 No. P.T. 375 Mukim Damansara Daerah Petaling, Selangor (the said property), by public auction held on 29 June 2000.

Facts

The defendant charged his said property to the plaintiff in respect of loan facilities granted to the defendant by the plaintiff. Since the defendant had defaulted, the plaintiff obtained an order for sale of the said property by public auction. The order of the court was made on 22 May 2000 and it contained *inter alia* terms that the said sale was to be held on 29 June 2000 at 9.30am at the auction room of the High Court of Kuala Lumpur at a reserve price of RM350,000. The defendant was notified of the auction by the court by way of a letter dated 22 May 2000. The letter which was exhibited to the defendant's affidavit in support of his application read as follows:

> Adalah dimaklumkan bahawa Mahkamah akan melelong harta No. Hakmilik H.S.(D) 86672 pada 29.6.2000 jam 9.30 pagi di BILIK LELONG, MAHKAMAH TINGGI KUALA LUMPUR, WISMA DENMARK, JALAN AMPANG, KUALA LUMPUR. Harga rizab yang ditetapkan oleh Mahkamah ialah RM350,000.00.

The proclamation of sale likewise contained similar details and in addition it stated that bidders at the auction ought to deposit 10% of the reserve price by way of a bankdraft by 9.15am of the date of the auction and that the balance of the price ought to be paid in full to the Deputy Registrar (DR) of the High Court of Kuala Lumpur within 90 days of the date of the sale. One Thanimalai Pathaperumal affirmed an affidavit in support of the application in which he stated that he had arrived at the place of auction at 9.20am with the intention of bidding at the said auction. He had with him a Standard Chartered cashier's order for RM35,000 being the 10% deposit of the reserve price. The learned DR refused to accept his deposit as he had failed to make the deposit before 9.15am. Both the defendant and the said Thanimalai maintained that the said auction only proceeded at 11.15am although it was stipulated to proceed at 9.30am. The said property was then sold to two other persons for RM352,000. Initially this application contained two further prayers, namely, (1) for an order that the subsequent two purchasers be made parties to these proceedings, and (2) for an injunction to restrain the plaintiff and the subsequent two purchasers from completing the order for sale. Prior to the commencement of the hearing of the said application the defendant withdrew these two prayers and by consent parties agreed that I proceed to hear only the prayer relating to the sale. Thanimalai maintained in his affidavit that if his deposit had been accepted the property could have been sold at a higher price.

Findings Of The Court

Indeed there is no dispute that the auction did proceed only at 11.15am and not at the time set by the court in its order dated 22 May 2000 and as published in the proclamation of sale and which was to be at 9.30am. What

is most surprising is that in their reply affidavits, neither the plaintiff nor the successful bidders, addressed this issue. To a question from the court as to why the learned DR did not proceed with the sale at 9.30am as ordered by the court, Ms. Susila for the plaintiff referred me to the conditions of sale which stated that the deposit was to be paid by 9.15am. She maintained that there was no condition that the auction would proceed at 9.30am.

Whilst I agree that in order to qualify as a bidder, prospective bidders ought to deposit the 10% of the reserve price by 9.15am, it seems to me that the plaintiff has totally ignored the terms set in the proclamation of sale. In my judgment the unassailable facts in the proclamation of sale reflect the order of the court dated 22 May 2000, that is, that the said auction would take place:

(1) on 29 June 2000;

(2) at 9.30am; and

(3) at the Auction Room, Mahkamah Tinggi Kuala Lumpur, Tingkat 8, Wisma Denmark, Jalan Ampang, Kuala Lumpur.

That the deposit ought to be paid to the DR by 9.15am by intended bidders was a condition set by the DR. To my mind it makes sense that if the auction was to be at 9.30am. there must be a cut-off point by which time the deposit must be paid. Otherwise, even as the auction was proceeding, intending bidders might be able to join in.

It is my judgment that the learned DR was right in rejecting Thanimalai's deposit which was made at 9.20am, but it is also my judgment that the learned DR had no power to vary the time of the auction. Firstly, there was an order already made on 22 May 2000 by the same DR that the said auction would be held at 9.30am at the place stipulated. The said order was perfected. It did not contain any order enabling her to vary her own order. She was therefore bound by her own order. Besides no reasons have been proffered as to why the DR did not proceed with the sale at 9.30am. She could not have been waiting for the price to be raised. Since Thanimalai's deposit had been rejected, it must mean that the two successful bidders must have paid their deposit well before 9.15am. Then why did she not proceed to call for the auction to commence at 9.30am. The plaintiff and the two successful bidders have failed to address the court on this issue. In any case the successful bidders had offered RM2,000 above the reserve price to clinch the deal. In *Bank Bumiputra Malaysia Bhd v. Pentadbir Tanah Daerah Gombak* [1992] 2 CLJ 15 Eusoff Chin J (as the Chief Justice then was) said at p. 84 as follows:

> In the case of an order of sale made by the court, the court's order made under s. 257(1) and the other directions with respect to the sale made by the court

under s. 257(2) shall form part of the 'conditions of sale' which the chargee has to prepare under s. 258(2)(a) of the NLC. Section 258 of the NLC states:

Procedure prior to sale

(1) Where any such order has been made, it shall be the duty of the Registrar of the Court:

(a) to serve a copy thereof on the chargor, and on every chargee of the land or lease in question; and

(b) to see that the sale is publicly advertised in accordance with rules of court or, in the absence of any rule in that behalf, the practice customarily adopted in the State.

(1) The chargee on whose application the order was made shall:

(a) prepare the conditions of sale, in accordance with the terms of the order and any determination thereunder by the Registrar of the Court.

It is therefore clear that the chargee had indeed prepared the conditions of sale in accordance with the terms of the order of the court dated 22 May 2000. In *M&J Frozen Food Sdn Bhd & Anor v. Siland Sdn Bhd & Anor* [1994] 2 CLJ 15 SC the then Supreme Court held that any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor was *ultra vires* the authority to sell under the National Land Code 1965 (NLC). In respect of this Wan Yahya SCJ said at pp. 22-23 as follows:

> ... We agree that the terms or conditions of sale may be varied, if having regard to the interest of both the chargor and the chargee, it is fair to do so; but the sale being a judicial one, has to be done by the court after giving the chargor the right to be heard. As the court's power to order the sale, including the authority to fix the price and conditions of sale, is derived from the statutory provisions of the NLC after giving the chargor the right to be heard, it is manifest that any alteration in the terms or conditions must likewise be exercised.
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> We consider any variation of the order of sale or the terms and conditions made thereunder in the absence of and without the service of the required notice to the chargor is *ultra vires* the authority to sell under the NLC.

In *Frozen Food* the Supreme Court held that the effect of extending the time of payment of the balance purchase price "is to cause a material change in the conditions of sale and thus render it no longer in accordance with or within the terms of the original order and determination made by the SAR". The court was of the view that the amended conditions of sale bearing some different terms or directions from the original conditions must be served again in

accordance with s. 258(1)(a) of the NLC on the chargor. Similarly in this case if the auction was to be held at 11.15am, this fresh condition ought to have been served afresh on the defendant/chargor.

Having considered all the issues I granted the defendant an order in terms of its prayer but made an order for each party to bear its own costs. I think I was wrong in making such an order with regard to costs. Since my order has not, as yet been perfected, I order that the defendant's costs of this application be paid by the plaintiff.